Transportation Repair & Service, Inc. *and* Automobile Mechanics Local No. 701, International Association of Machinists & Aerospace Workers, AFL-CIO. Cases 13–CA–34794 and 13–RC–19517

April 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On September 5, 1997, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions,[1] cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.

AMENDED CONCLUSIONS OF LAW

1. By threatening to close its facility; by threatening employees with wage reduction, loss of benefits, and reclassification; and by coercively interrogating employees about their support for the Union, the Respondent has violated Section 8(a)(1) of the Act.

2. By refusing to recognize and bargain collectively with the Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

3. By discriminatorily discharging Edward Monreal, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By the above conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Union's Objections 1, 2, and 3 parallel the threats set forth in Conclusion of Law No. 1, above, and are sustained.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Transportation Repair & Service, Inc., Cicero and Willow Springs, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Automobile Mechanics Local No. 701, or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Threatening to close its Willow Springs facility or terminate its contract with the railroad or to lay off employees, or to reduce employees' wages and benefits, or to reclassify employees.

(d) Refusing to recognize and bargain collectively with Automobile Mechanics Local No. 701, International Association of Machinists & Aerospace Workers, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time journeymen and apprentice trailer mechanics and bodymen, tiremen and

[1] We deny the General Counsel's request to disregard the Respondent's exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the 8(a)(1) violations found by the judge, we find it unnecessary to rely on his distinction in finding that the Respondent threatened employees that it "might" or "would be likely" to close the plant if the Union won the election, rather than that the Respondent threatened that it "would" close the plant. We find that the Respondent's statements constitute an unlawful threat of plant closure under either characterization.

[3] The General Counsel, in his cross-exceptions, contends that the judge found certain violations of Sec. 8(a)(1) which he failed to include in his conclusions of law, recommended Order, and notice to employees. We find merit in this exception and have accordingly modified the judge's Conclusions of Law, recommended Order, and notice to employees to reflect all the violations found in this case. We have also modified the judge's Conclusions of Law 5 to more accurately describe the Union's objections to the election. We shall also modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 7 (1997). Finally, the judge did not include broad injunctive cease-and-desist language in the recommended Order. We conclude that the serious and pervasive nature of the Respondent's unlawful conduct warrants the imposition of a broad cease-and-desist order. *Hickmott Foods*, 242 NLRB 1357 (1979). We shall modify the judge's recommended Order accordingly.

After the judge's decision issued in the instant case, the United States Court of Appeals for the Fourth Circuit denied enforcement of the bargaining order in *Be-Lo Stores*, 318 NLRB 1 (1995). *Be-Lo Stores v. NLRB*, 126 F.3d 268 (1997). We note, however, that the general propositions for which the judge cited the Board's decision in *Be-Lo Stores* are not affected by the court's denial of enforcement. *Be-Lo Stores,* 126 F.3d at 275; and see *Davis Supermarkets*, 2 F.3d 1162, 1171 (D.C. Cir. 1993), enfg. 306 NLRB 426 (1992); *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995); *Justak Bros. v. NLRB*, 664 F.2d 1074, 1081–1082 (7th Cir. 1981), enfg. 253 NLRB 1054 (1981).

mobile trailer repairmen employed by the Employer at its facility currently located at 7600 West Santa Fe Drive Hodgkins [Willow Springs] Illinois 60522; but excluding office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Edward Monreal full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Edward Monreal whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Edward Monreal in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Willow Springs, Illinois facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

(i) IT IS FURTHER ORDERED that the Union's Objections 1, 2, and 3 are sustained and the election held January 28, 1997, in Case 13–RC–19517, is set aside, and the petition is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Automobile Mechanics Local No. 701 or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten to close the Willow Springs facility, terminate our contract with the railroad, lay-off employees or reduce their wages or benefits, or threaten to reclassify them, should they support or select the Union as the collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time journeymen and apprentice trailer mechanics and bodymen, tiremen and mobile trailer repairmen employed by us at our facility currently located at 7600 West Santa Fe Drive Hodgkins [Willow Springs] Illinois 60522; but excluding office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Edward Monreal full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Edward Monreal whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Edward Monreal, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

TRANSPORTATION REPAIR & SERVICE, INC.

Sheryl Sternburg and *Usha Dheenan, Esqs.*, for the General Counsel.
Donald F. Peters Jr. and *James G. Ciesil, Esqs. (Donald F. Peters, Jr.*), of Chicago, Illinois, for the Respondent.
Joe Cooper, Grand Lodge Representative, of Des Plaines, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on June 9–11, 1997. The charge was filed December 16, 1996, and was amended on February 3 and 21, 1997. The complaint was issued on February 28, 1997.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, repairs piggy-back truck trailers at its facility in Willow Springs, Illinois,[1] where it annually received gross revenues in excess of $500,000, and performed services valued in excess of $50,000 for customers which are directly engaged in interstate commerce. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Overview

The Respondent, Transportation Repair & Service, Inc. (TRS) is owned by Thomas Swiderski and has been in business for 12 years. Its main offices are in Cicero, Illinois, where 50 of its 75 employees work. On June 1, 1996, TRS was awarded a contract to repair piggy-back truck trailers at the Burlington Northern-Santa Fe (the railroad) yard in Willow Springs, Illinois. The railroad provides Respondent with a building for its repair shop and Respondent provides labor, billed at $26 per hour, and parts, billed with a markup. At Willow Springs, Respondent does work exclusively for the railroad. Approximately 25 employees worked for the Respondent at Willow Springs in the fall of 1996. Most of these had not worked for TRS previously.

[1] The mailing address of the facility is Hodgkins, Illinois.

In October 1996, mechanic Edward Monreal contacted David Mullin, an organizer for Automobile Mechanics Local 701 to inquire about starting an organizing campaign. Monreal passed out union authorization cards to 17 of the 25 employees in the bargaining unit.[2] [3] He told each of them that the card was for representation and to get an election. All 17 employees who took a card signed one.

On December 13, 1996, Respondent received a letter from the Union stating that a majority of TRS employees at Willow Springs had authorized Local 701 as their bargaining representative. A stipulated election agreement was entered into and on January 28, 1997, a secret ballot election was conducted for the following bargaining unit:

> All full-time and regular part-time journeymen and apprentice trailer mechanics and bodymen, tiremen and mobile trailer repairmen employed by the Employer at its facility currently located at 7600 West Santa Fe Drive Hodgkins [Willow Springs] Illinois 60522; but excluding office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

The Union lost the election 11 to 8. One ballot, that of John Leeper, was challenged by the Union, which alleges that he is a supervisor, and was not counted. Within a few days, the Union filed objections to the election, alleging that Respondent unlawfully threatened to close the Willow Springs facility if the Union won the election. It also alleged that TRS threatened employees with a loss in wages, and reclassification of their jobs if they selected the Union.

Two days after the election, Harold Schneidewend, Respondent's operations manager fired Ed Monreal, the principal union advocate, allegedly for putting earplugs in the gas tank of a "spotter" vehicle. This machine is used to move trailers around the yard. The General Counsel and the Union allege that Monreal's termination was retaliatory and thus in violation of Section 8(a)(1) and (3) of the Act.

Events prior to the election: the December 12 and 13, 1996 meetings conducted by Thomas Swiderski

The most important events leading to the January 28, 1997 election were meetings on December 12 and 13, 1996, at which Respondent's owner, Thomas Swiderski, addressed the Willow Springs mechanics. On the afternoon of December 12, a meeting was held for second shift employees. On the morning of December 13, a meeting was held for first and third shift employees. There is general agreement among the witnesses that Swiderski said virtually the same things at both meetings. Eight employees indicated that Swiderski said that if the employees elected to unionize he would have to exercise his option to terminate his contract with the railroad. Swiderski and operations manager Schneidewend deny that Swiderski said any such thing. Swiderski testified that he explained to the employees that the operation at Willow Springs had only one

[2] The General Counsel contends that John Leeper is a supervisor and therefore not properly included in the bargaining unit.

[3] Monreal gave each of the cards to his coworkers personally, except David Buechel (G.C. Exh. 13). Monreal gave a card and a union booklet to employee Kenneth Adair, who gave it to Buechel's brother. Adair received a card affixed with what he testified was Buechel's signature and returned it to Monreal.

customer and that he had a contract with the railroad by which it paid him $26 per hour for labor plus a mark-up on parts.

Swiderski stated he told employees that if he requested a rate increase from the railroad, it "wouldn't go over very well." He confirms he informed the employees that both parties had a right to cancel the contract on 30 days' notice. Schneidewend testified that Swiderski "basically told them that we had a—we went into the yard a low bid, and if they got in with high union wages, that it might put him [in] the predicament where being himself, TRS, or the Burlington Northern Santa Fe have a 30-day cancellation clause, if he could not stay in business to make money, then he would have to give up his contract (Tr. 257)."

The testimony of the eight employees is as follows:

Ed Monreal testified that at the December 13 meeting, Swiderski said that if the Union was voted in, he would close the shop because he couldn't afford the Union. Monreal also said that Swiderski stated that wages would be lowered.

Joshua Honaker recalled Swiderski saying that if the Union was voted in he would close the shop.

Adam Gilliland attended the December 12 meeting. He recalled Swiderski discussing his contract with the railroad and saying that if the shop unionized and the Union forced him to raise wages, the railroad would not "go for it." At the hearing in June 1996, Gilliland testified that Swiderski then stated that if the railroad did not go for it, it would give TRS 30 days to leave the shop. However, in an affidavit given to the NLRB on March 20, 1997, Gilliland stated:

> During the meeting I recall Swiderski explaining that Santa Fe and the Company had a contract that permitted him to spend so much per trailer and that he felt if the Union came in, the salaries would be too much. Swiderski said if the Union came in, he was sorry but that he would have no choice but to close the doors and walk away from the contract because he could not afford that. (G.C. Exh. 22.)

Juan Cano, attended both meetings. Cano normally worked the first shift in December 1996, but attended the December 12 meeting because he was working overtime. Cano recalled Swiderski giving the same speech at both meetings. Swiderski said he could not work with the Union and that if the employees selected it, he would close the shop and everybody would lose their jobs. I consider Cano to be the single most credible witness who testified at the hearing. He appears to have no animus toward TRS. He still works for TRS at Willow Springs and was promoted to leadman sometime in 1997. Moreover, he received a $1 per hour raise a few weeks prior to the hearing.

Cano, whose first language is Spanish, testified at times in Spanish through an interpreter and at other times in English. He appeared to speak and understand English quite well. Although he testified that he was unable to follow a heated discussion between Monreal and Swiderski at the December 13 meeting, I conclude that Cano was able to understand Swiderski's speech and testified about it accurately.

Victor Alvarez, Robert Levy, and Alfred Gonzalez also testified that Swiderski stated he would have to terminate his contract and give up the Willow Springs shop if the Union won. Kenneth Adair recalled Swiderski saying that he couldn't afford to pay union wages and that if the employees "pushed it" he would exercise his 30-day termination rights and close the shop.

From this testimony I conclude that Swiderski indicated to the employees that the likely result of a union victory would be that he would exercise his contract termination rights and close the Willow Springs facility. While Monreal, Alvarez, Levy, and Adair have some degree of arguable bias against the Respondent, Honaker, Cano, Gilliland, and Gonzalez do not. I am not convinced that Swiderski stated that a union victory would automatically cause him to shut the facility because if he did so it would not make sense for him to predict (or threaten) other consequences, such as reduced wages and reclassification of employees.

Other statements or actions alleged to have been taken by Respondent

Ed Monreal alleges that on at least two occasions Operations Manager Schneidewend told him that Swiderski would close the doors at Willow Springs if employees selected the Union. On one occasion apparently in November, Schneidewend and John Leeper allegedly approached a group of employees in the lunchroom. Monreal says Schneidewend said that Swiderski would close the shop if the employees voted in the Union. He also says that Schneidewend stated that employees would lose wages and that shifts would change if the Union won. Monreal also claims that John Leeper[4] said that employees would lose their uniforms and bonuses if the Union was victorious. Schneidewend and Leeper deny saying any such things to employees. Juan Cano and Robert Levy corroborated Monreal's testimony. I conclude that Schneidewend did tell employees that Swiderski might or would be likely to close the plant if the Union won. As stated above, I find that he did not say that Swiderski would close the plant because the other statements attributed to him make no sense in this context. If Swiderski was definitely closing the plant, there would be no wages to cut or shifts to change.

Monreal also alleges that a few days before the employee meetings with Swiderski, Schneidewend told him that TRS would close the doors if the Union was successful in organizing the Willow Springs employees. I credit this testimony generally but find that Schneidewend said something to the effect that TRS might or would likely close its doors if the Union won.

Employees Ted Ruth and Mitch Goslinowski missed the employee meetings held by Swiderski. Afterward, Schneidewend described the meeting for them. I conclude, for the reasons stated above, that he told them that Swiderski said he might close the shop if the Union was voted in. He also told them that less experienced employees like themselves might be let go or

[4] Aside from Schneidewend, Leeper was the only employee on the day shift who spent most of his time in the office. Leeper is paid $12 per hour, less than some of the mechanics. He worked at Willow Springs for the contractor previous to TRS and was hired by Respondent when they were awarded the contract at this facility. Seventy-five percent of his day was spent doing clerical duties, such as retrieving reports of damaged trailers from the railroad, writing out work orders, billing, and answering telephones. Twenty-five percent of his time is spent moving trailers with the spotter vehicle and other manual labor. Leeper does not hire or fire employees or recommend such personnel actions. He doesn't give out disciplinary warnings or approve leave. He does not authorize overtime without checking with Schneidewend first. Leeper assigns work to mechanics if Schneidewend is not at the Willow Springs facility. He also scrutinizes mechanics' work at Schneidewend's direction and communicates Schneidewend's unhappiness with substandard work to employees. For reasons stated below I conclude that Leeper was an agent of the Respondent in his communications with employees about the Union, but not a supervisor.

have their wages reduced. Schneidewend also said employees might lose their end-of- the-year bonuses.

Ruth was also visited at home by John Leeper, who asked him how he intended to vote in the election. Ruth overheard Leeper on another occasion tell Mitchell Goslinowski that a union victory would result in the loss of bonuses and employee uniforms.[5]

Sometime in November, Harold Schneidewend asked Juan Cano if he had signed a union authorization card. Cano replied in the negative although he had signed a card. I credit this testimony which is consistent with Schneidewend's testimony that he asked employees if they were looking into a Union (Tr. 298).

Events leading to the discharge of Ed Monreal

Respondent was well aware that Ed Monreal was one of, if not the most, active employee in the union organization drive. During the week of January 6, 1977, he represented the Union at a preelection conference with Respondent's counsel. Moreover, at the December 13 employee meeting, Monreal and Swiderski got into a heated argument, which ended in the two men screaming at each other. When Swiderski asserted that he could not afford the Union, Monreal asked him what it cost to run the business. Swiderski responded that if Monreal needed to know this he should come to his office. Monreal asked why he couldn't tell all the employees (Tr. 58, 258–259).

Sometime between the December 13 meeting and Monreal's termination, Harold Schneidewend took photographs of trailers repaired by Monreal (Tr. 94–96). Schneidewend testified:

> It it's bad workmanship or there's improper workmanship, I'll take pictures of it and I'll put it in their personnel file. It doesn't mean that I'm going to come up and give them a letter for bad workmanship. I try to keep records on employees' work. [Tr. 260.]

Schneidewend took no action on the basis of the photographs. Indeed, he did not testify that there was anything wrong with the work performed by Monreal. As there is no other evidence that the work photographed was done improperly or that the work of other employees was photographed, I infer that the photographs were taken due to animus toward Monreal's union activities and that Respondent was looking for a reason to discharge him.

At the Willow Springs yard, Respondent uses a vehicle commonly called a spotter. The spotter is a tractor with a fifth hydraulic wheel that is used to move trailers in and out of the shop and around the yard. Respondent has only one of these vehicles at Willow Springs. The spotter is an old vehicle which broke down quite a few times in the winter of 1996–1997 (Tr. 335). Sometime in mid-to-late January, a number of employees at the yard heard that while repairing the spotter, mechanic Ray Farrano found several earplugs in its gas tank.[6]

On January 29, 1977, the day after the election, Gregory Wilson, a mechanic apprentice who is also the stepson of John Leeper,[7] told Harold Schneidewend that about a week or two earlier he saw Ed Monreal, on two different occasions, put ear plugs in the gas tank of the spotter. According to Wilson, on the morning of January 17, he had come into the shop to get his tools. Monreal was working with mechanic Robert Levy. Monreal then put some earplugs in the spotter's fuel tank saying "this will clog the something. (Tr. 318)." According to Wilson, Monreal then told him not to say anything.

Wilson also testified that later the same day he came back into the shop and saw Monreal open a pack of earplugs and drop two more into the spotter's fuel tank. Wilson testified further that although Monreal didn't say anything to him, Monreal saw him.

Wilson asserts that he did not immediately inform Respondent about this incident because he wasn't sure the earplugs would damage the vehicle. He testified that he decided to tell Schneidewend a week or so later, when he heard that Farrano had found the plugs in the gas tank. He also testified that January 29, 5the day he reported the incident was the day the spotter broke down.[8]

On January 29, Schneidewend asked Wilson to write out a statement concerning his observation of Monreal throwing earplugs into the gas tank. The next day he asked Wilson to write the statement out again on a full-sized piece of paper. On January 30, apparently after getting the second statement, Schneidewend asked Monreal if he put the earplugs in the fuel tank. Monreal said that he did not and didn't know who did. Moreover, Monreal said that if he wanted "to take a spotter down, that he would know how to do it better than by putting earplugs in it (Tr. 263)." Schneidewend, apparently fired Monreal immediately before making any other inquiry regarding the incident (Tr. 263).[9]

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[5] I find Ruth's testimony credible. Although he was fired in April or May 1997, his February 3, 1997 affidavit to the NLRB is consistent with his hearing testimony.

[6] Farrano did not testify at the hearing and thus the evidence concerning the ear plugs found in the tank is hearsay, except for the testimony of Greg Wilson, which I discredit.

[7] On January 17, Wilson worked as a mobile mechanic apprentice with Gary Sylvester. As opposed to Monreal who worked inside the shop, Wilson and Sylvester rode around the yard repairing trailers that did not have to be brought into the shop. Monreal was aware that Wilson was John Leeper's stepson (Tr. 324).

[8] Line 25 on Tr. P.319 should read: "A. Of January. Day it broke down." Rather than "Dave broke down." Wilson also testified that he talked to Gary Sylvester about whether he should tell Schneidewend about the ear plugs, a few minutes before doing so. Sylvester was called as a witness by Respondent but was not asked any questions about discussing the ear plug incident with Wilson. Robert Levy also testified that the spotter broke down on January 29 (Tr. 172).

[9] Schneidewend may have consulted with TRS President Swiderski before firing Monreal. I find Schneidewend's testimony regarding his inquiry into Monreal's culpability to be internally inconsistent and not credible. It also appears to be inconsistent with Wilson's testimony in that Schneidewend indicates that he was probably informed by Farrano that he found the earplugs several days before terminating Monreal (Tr. 285–286). This is inconsistent with Wilson's testimony that the spotter broke down on January 29, thus prompting him to come forward about Monreal the same day.

The internal inconsistency of Schneidewend's testimony concerns his conversations with Robert Levy, who according to Wilson saw Monreal put the first two ear plugs into the spotter's gas tank. On direct examination, Schneidewend testified that he fired Monreal about noon on January 30, 1997. Right afterward, Schneidewend says Bob Levy approached him and told him that Monreal had ripped the wires out of Schneidwend's forklift (Tr. 263–264). He said nothing about talking to Levy before terminating Monreal. On cross, he contended that he spoke to Levy about the earplugs before he fired Monreal and that Levy refused to give him a statement or say anything about the incident (Tr. 288). It strikes me as very unlikely that Levy would, on

Analysis

Respondent violated Section 8(a)(1) in threatening employees with possible plant closure, reduction in wages, loss of benefits and reclassification. Respondent also violated Section 8(a)(1) in interrogating employees about their support for the union.

Statements made by Thomas Swiderski

On December 12 and 13, Respondent's president, Thomas Swiderski, violated Section 8(a)(1) in indicating to employees that a likely result of a union victory would be the termination of his contract with the railroad and the cessation of Respondent's activities at Willow Springs. An employer is free to make a prediction as to the precise effect he believes unionization will have on his company. However, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative, the statement is no longer a reasonable prediction but a threat of retaliation. Conveyance of an employer's belief, that unionization will or may result in the closing of the plant, is not a statement of fact unless the eventuality of closing is capable of proof, *NLRB v. Gissel Packing Co.,* 395 U. S. 575, 618 (1969).

Swiderski's statements regarding the termination of Respondent's contract in the event of unionization were not predictions based on objective facts. First, the unionization of the Willow Springs facility might not necessarily result in wage increases that would make Respondent's operation unprofitable. The Union might prove unsuccessful in achieving any wage increase. Moreover, Respondent made no showing regarding its profit margin at the facility or what magnitude of wage increase would make its Willow Springs operation unprofitable.

Further, assuming that Respondent would have to ask the railroad for an increase in the contract price for labor, there is no evidence that the railroad would terminate Respondent's contract. The record is silent regarding any conversations Swiderski may have had with railroad officials on this subject. It is possible that the next lowest bidder to TRS bid significantly higher than Respondent. Thus, the railroad might be agreeable to an increase the labor charge paid to TRS. TRS' labor charge might still be less than other potential contractors even if it raised wages. Moreover, the railroad might deem TRS to be more reliable or proficient than other contractors, even if their services might be cheaper.

In *Crown Cork & Seal Co.,* 255 NLRB 14 (1981), enf. 691 F.2d 506 (9th Cir. 1982), the Board found similar statements violative of Section 8(a)(1). In that case management told employees that if the Union "got in," Pepsi Cola, the sole customer for its steel cans, would switch to less costly aluminum cans and the Company would be forced to shut down. The Board found these statements were not based on objective facts. It did not necessarily follow, said the Board, that a union election victory *per se* would increase Respondent's labor costs disproportionately to Pepsi's willingness to pay increased costs if passed on, or that Pepsi would discontinue purchasing the Company's cans.

Statements made by Harold Schneidewend

The statements made by Operations Manager Schneidewend that Swiderski might close the Willow Springs facility also violated Section 8(a)(1), as did his statements predicting wage reductions, changes in employee shift assignments, loss of bonuses and, layoffs of inexperienced employees. Schneidewend's inquiry to Juan Cano regarding his support for the Union violated the Act as well. In the context of the other statements being made by management, such an inquiry was likely to restrain and interfere with employee's Section 7 rights, *Rossmore House,* 269 NLRB 1176 (1984). The fact that Cano, who did not openly support the Union and was apparently not known to be a union supporter, felt the need to give a false answer regarding his signing of the authorization card is a good indication of the coercive effect of the inquiry.

Statements made by John Leeper

I also conclude that Respondent violated the Act through John Leeper, who asked Ted Ruth how he intended to vote in the NLRB election and told employees that a union victory might result in the loss of bonuses and uniforms. I do not agree with the General Counsel that Leeper was a supervisor. However, I conclude that he was an agent of TRS when he made these statements and the inquiry to Ruth. Additionally, those statements made by Leeper in Schneidewend's presence were made with apparent authority from TRS.

Section 2(11) of the Act defines a supervisor as an individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward,or discipline other employees or having responsibility to direct them, or adjust their grievances, or effectively to recommend such action. However, possession of one or more of the stated powers does not convert an employee into a 2(11) supervisor unless the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, *Adco Electric,* 307 NLRB 1113, 1120 (1992). Leeper was Respondent's office clerk. His prioritization of work orders from the railroad and transmittal of these work orders to employees appears to be a routine, clerical task rather than one requiring the exercise of independent judgment. Leeper did not hire, fire, or discipline employees. He didn't schedule overtime or approve time off. Leeper on occasion suggested to Schneidewend that an employee should work overtime to finish repairing a trailer. Leeper is paid $12 per hour, less than many of the mechanics. Although Leeper was in charge of the Willow Springs facility in Schneidewend's absence, he did not have the authority to act independently that would make him a supervisor.

On the other hand, Schneidewend has asked Leeper to scrutinize the work of some mechanics and to tell them when their work is deficient (Tr. 283). Due to this and the fact that employees were led to understand that Leeper was in charge at Willow Springs in Schneidewend's absence, a number of employees considered Leeper to be their supervisor. When Leeper spoke to employees, they could and in fact did believe that he spoke for management. Therefore I conclude that when making predictions as to the consequences of a union victory or

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the same day, volunteer information about the forklift but refuse to corroborate Wilson about the earplugs. Levy, who was fired by Respondent in February 1997, testified that he did not see Monreal put earplugs in the spotter and that he did not see Monreal pull wires from a forklift. Levy also denied that Monreal told him that he pulled out the forklift wires or that Levy told Schneidewend that Monreal had pulled these wires.

making inquiries about employee sympathies, Leeper was an agent of TRS, *Dentech Corp.,* 294 NLRB 924 (1989).[10]

Respondent violated Section 8(a)(3) by discharging Edward Monreal on January 30, 1997

In order to prove that an employer violated Section 8(a)(1) and (3) in terminating an employee, the General Counsel must show that union activity has been a substantial factor in the employer's decision. Then the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in union or other protected activity. *Wright Line,* 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

To establish discriminatory motivation the General Counsel generally must show union or other protected activity, employer knowledge of that activity, animus or hostility toward that activity and a causally-related adverse personnel action. Inferences of knowledge,[11] animus[12] and discriminatory motivation[13] may be drawn from circumstantial evidence rather than from direct evidence.

Edward Monreal was the principal union advocate among the TRS employees. He distributed the authorization cards and openly challenged Company President Swiderski's assertions that he could not afford the Union at the December 13 meeting.[14] I also infer that Swiderski and Schneidewend knew that Monreal attended the January 6, 1997 preelection conference on behalf of the Union.

Swiderski's shouting match with Monreal, as well as the unsatisfactorily explained photographing of trailers repaired by Monreal, are direct evidence of animus on the part of TRS management toward his union activities. Additionally, the timing of his discharge, just 2 days after the election suggests retaliatory motivation.[15]

I conclude that the General Counsel has established a prima facie case that Monreal was discharged in retaliation for his union activities in violation of Section 8(a)(1) and (3) of the Act. The question is therefore whether Respondent has rebutted the prima facie case by establishing that it nondiscriminatorily discharged Monreal for putting earplugs into the gas tank of the spotter vehicle or because it believed he had done so. I conclude that it has not rebutted the prima facie case.

Although I have already indicated that I find Gregory Wilson's testimony, that he saw Edward Monreal throw earplugs into the gas tank, to be not credible, the issue is whether Respondent reasonably relied upon Wilson's statements. I conclude, that assuming Respondent did not already know Wilson's story to be fabricated, it was not acting reasonably in firing Monreal on the basis of Wilson's story.

Wilson's account of the earplug incident should have engendered a great deal of skepticism on the part of Schneidewend. To the contrary, Schneidewend was all too eager to accept the story at face value. Monreal, by mid-January 1997, could not have been unaware that TRS would welcome a reason to fire him. While it is possible that he would be sufficiently foolhardy to sabotage a piece of equipment in front of another employee, it is highly unlikely. It is even more unlikely that he would do so in front of Wilson. Monreal would have no reason to believe that Wilson would keep his actions a secret. There was no reason for Monreal to trust Wilson not to tell anyone about the earplugs. Monreal was aware that Wilson was the stepson of John Leeper, an employee generally regarded by the mechanics to be part of management.

Finally, if Monreal was trying to sabotage the spotter, he should have expected management to discover the earplugs when the vehicle broke down. He would also have to expect management and John Leeper to inquire into the circumstances of how the earplugs got into the spotter's gas tank. In such a scenario, it is unlikely that he would expect Wilson to keep his secret.

Even if Schneidewend failed to give Monreal credit for any instincts for preserving his job, there are other aspects of Wilson's story that would lead one to be skeptical—unless one regarded it as a heaven-sent opportunity to get rid of Monreal. If the spotter did not stop running for 12 days after Monreal put the earplugs in the gas tank, it would not be reasonable for Wilson or Schneidewend to assume that the plugs were responsible for the machine breaking down. As Wilson testified, the vehicle broke down frequently. It is unlikely that 12 days after seeing Monreal put earplugs in the gas tank, Wilson concluded that this caused the vehicle to stop running and that therefore he should report what he saw to Schneidewend.

As to Respondent's motivation, it is also noteworthy that it offered no evidence to establish that the spotter was inoperative on or about January 29, due to the fact that earplugs had been put in the gas tank.16 Indeed, it is questionable in the absence of testimony from Ray Farrano, whether this record contains substantial evidence that ear plugs were found in the tank. In conclusion, TRS has not established that it would have fired Edward Monreal regardless of his union activity. Therefore, his discharge violated Section 8(a)(1) and (3) of the Act.

The Union represented a majority of bargaining unit employees when it requested recognition from TRS on December 13, 1996, thus Respondent's refusal since that date to bargain with the Union violates Section 8(a)(5). TRS' coercive conduct prevented the holding of a fair and free representation

[10] The General Counsel also alleged that Respondent violated Sec. 8(a)(1) through statements made by Gary Sylvester, a mobile mechanic, who was apparently opposed to the Union. I find the General Counsel has not established that Sylvester was an agent of TRS or spoke with its apparent authority. Although it was quite clear that Sylvester shared management's views about unions, there was no reason for employees to conclude that Sylvester spoke on management's behalf, even though Schneidewend encouraged employees to talk to Sylvester about his experiences as a union member. I find that Respondent's suggestion to employees that they talk to Sylvester about unionization did not violate Sec. 8(a)(1). I do not find that TRS told Sylvester what to say to employees or that TRS had specific knowledge of what he would say. I think it is obvious that Schneidewend knew that Sylvester would encourage employees to vote against the Union.

[11] *Flowers Baking Co*., 240 NLRB 870, 871 (1979).

[12] *Washington Nursing Home*, 321 NLRB 366, 375 (1996).

[13] *W. F. Bolin Co. v. NLRB,* 70 F.3d 863 (6th Cir. 1995).

[14] The Respondent also knew of Monreal's support for the Union from stickers he displayed on his toolbox in the shop.

[15] The Respondent's motivation for retaliation had not decreased by virtue of its victory in the NLRB election on January 28. The Union filed its first unfair labor practice charge in this case on December 16, 1996, alleging that TRS had threatened to close its facility and had interrogated employees as to union sympathies. I infer that TRS anticipated that the Union would file objections to the election; indeed, it may have already been aware that these objections, which were received by the NLRB on February 4, 1997, were going to be filed.

[16] The earplugs may have been made of styrofoam, which floats (Tr. 341–342).

election on January 28, 1997. An order requiring TRS to bargain with the Union is the appropriate remedy for the violations that prevented a fair and free representation election.

At the time it requested recognition from TRS the Union had obtained valid authorization card from 17 of the 25 bargaining unit employees. Since the Union enjoyed majority support, TRS has violated Section 8(a)(5) since December 13, 1996, in refusing to recognize and bargain with the Union.

The predictions made by Swiderski and repeated by Schneidewend as to the possibility that TRS would terminate its contract at Willow Springs, together with the other aforementioned 8(a)(1) violations made it impossible to conduct a fair and free representation election on January 28, 1997. These violations and the discriminatory discharge of Edward Monreal make the possibility of erasing the effects of past unfair labor practices and ensuring a fair rerun election slight. Therefore, as discussed more fully below, the Union's objections to the election are sustained, the results must be set aside, and Respondent is ordered to recognize and, on request, bargain with the Union.

Under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), there are two categories of cases in which the Board may issue a bargaining order. "Category I" cases are those marked by outrageous and pervasive unfair labor practices. "Category II" cases are less extraordinary cases marked by less pervasive practices which still have the tendency to undermine majority strength and impede the election process.

I conclude that a bargaining order is appropriate in the instant case on the basis of the "Category II" criteria. Therefore, I find it unnecessary to determine whether TRS' violations rise to the level of "Category I." To warrant the issuance of a bargaining order in "Category II" cases, (1) the union must have had majority support within the bargaining unit at some time; (2) the employer's unfair labor practices must have had the tendency to undermine majority strength and impede the election process; and (3) the possibility of erasing the effects of past unfair labor practices and ensuring a fair rerun election by use of traditional remedies is slight, and the once expressed sentiment in favor of the union would be better protected by a bargaining order, *Be-Lo Stores,* 318 NLRB 1, 12 (1995).

The Respondent does not seriously contest the fact that the Union had support of a majority of the bargaining unit employees in mid-December 1996. Ed Monreal obtained signed authorization cards from 17 of the 25 unit employees. He told each one the card was to get representation and an election. Respondent objected to receipt into evidence of only two of the cards. Only with respect to the card of David Buechel is there any question as to its authenticity (see fn. 3).

There can also be little dispute whether the unfair labor practices that I have found were committed by TRS tended to undermine the Union's majority strength and impeded the election process. Obviously, if employees were led to believe that there was a good chance they would lose their jobs if the Union won, they would be less inclined to vote for union representation. Moreover, the Union's majority was undermined by the suggestions made by management to the less experienced employees that they would be most likely to suffer a job loss, wage reduction, or change in working conditions.

The key issue regarding issuance of a bargaining order is whether the effects of the unfair labor practices can be erased by remedies short of a bargaining order so that a fair rerun election can be conducted. In determining whether these "traditional" remedies will suffice, the Board examines the nature and persuasiveness of the employer's practices. An examination of the persuasiveness includes consideration of the number of employees affected by the violations, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practices, *Be-Lo Stores,* supra at 14.

The threat of plant closure, which was made to all, or virtually all, the employees in the bargaining unit by company President Swiderski and reinforced on at least several occasions by Operations Manager Schneidewend is considered by the Board to be a "hallmark" violation which supports the issuance of a bargaining order in the absence of significant mitigating circumstances, *Highland Plastics, Inc.,* 256 NLRB 146, 147 (1981); *Eddyleon Chocolate Co.,* 301 NLRB 887, 891 (1991). The fact that this threat was made by the two highest company officials, who still run TRS' operation at Willow Springs to the entire 25-member bargaining unit makes it very unlikely that the effects of this threat can be erased by "traditional" remedies and that a fair rerun can be conducted.

Moreover, the discharge of the principal union advocate two days after the election by these officials makes it more unlikely that a fair rerun election can be held. Although several of the employees who worked at Willow Springs in January 1997 have left the facility, the circumstances of Monreal's discharge are likely to become the lore of the shop. Monreal's success in obtaining redress of his discharge, after a significant passage of time, is not likely to give current employees any confidence that they can avoid retaliation if they campaign for and vote for the Union. For the reasons above, I conclude that the chances of a free and fair rerun election is very slight and that the issuance of a bargaining order is therefore warranted.[17]

CONCLUSIONS OF LAW

1. By threatening to close its facility, and by coercively interrogating employees about their support for the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By refusing to recognize and bargain collectively with the Union, Respondent violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act..

3. By discriminatorily discharging Edward Monreal, the Respondent has violated Section (8)(a)(1) and (3) and Section 2(6) and (7) of the Act.

4. The Union's Objections 1, 2 and 3, parallel the unfair labor practice conclusions set forth above and must be sustained.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

[17] In its brief, the General Counsel argues that a fair rerun is also unlikely because TRS implemented a 401(k) plan in May 1997, while the Union's objections to the election were pending, and because wage increases and other benefits were given to certain bargaining unit members since January 1997. Although the implementation of the 401(k) plan while the objections were pending is suspicious, it is not alleged as a violation of the Act in the complaint. Due to this fact it would violate Respondent's due process rights to rely on the evidence regarding the 401(k) plan and other postelection benefits in determining the propriety of a bargaining order. It may well be that Respondent could have offered evidence that would have rebutted any inference of illegality in these transactions.

desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Edward Montreal, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]